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CASE NO.

Supreme Court, U.S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Must age-based distinctions in bona fide employee benefit plans, including plans promulgated prior to the passage of the Age Discrimination in Employment Act, be justified by a substantial business purpose?

PARTIES

The Appellant in this action is the Public Employees Retirement System of Ohio.

The Appellee is June M. Betts.

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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued on June 3, 1988, is set forth in the Appendix (A-1) and is reported at 848 F.2d 692. The decision of the United States District Court for the Southern District of Ohio, Western Division, is also set forth in the Appendix (A-20) and is reported at 631 F. Supp. 1198.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on June 3, 1988, holding Ohio Revised Code Section 145.35 in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sections 621-634. This action was initiated by Appellee in the district court by filing a complaint pursuant to 42 U.S.C. § 1983 and 29 U.S.C. § 626(c). The Notice of Appeal was filed with the Sixth Circuit on August 1, 1988, within 90 days of entry of the court of appeals' judgment. This appeal is

taken, and jurisdiction conferred upon this Court, under 28 U.S.C. Section 1254(2).

If the Court determines that an appeal is not proper in this case, Appellant respectfully requests that this Jurisdictional Statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. Section 2103.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix (A-38). The federal regulations involved are set forth in the Appendix (A-40).

STATEMENT OF THE CASE

This appeal is brought by the Public Employees Retirement System of Ohio ("PERS") from the judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") that a law of the State of Ohio, Ohio Revised Code § 145.35 ("O.R.C. § 145.35") violates the Age Discrimination in Employment Act ("ADEA" or "Act"), 29 U.S.C. §§ 621-634. The appellate court held that O.R.C. § 145.35 does not qualify for exemption as a "bona fide employee benefit plan" pursuant to 29 U.S.C. § 623(f)(2) because it makes distinctions in benefits between older and younger workers that are not based on age-related cost factors.[1]

[1] O.R.C. § 145.35, in relevant part, provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program.

PERS, the nation's seventeenth largest pension system,[2] was established in 1933 to provide retirement benefits, including regular income and health care, to the majority of Ohio's public employees.[3] Under the PERS statutory scheme, retirement benefits are available to members who terminate their public employment and qualify on the basis of either their age and service or because of permanent disability. Neither age and length of service nor disability retirement benefits cease at any particular age, although disability retirement may be converted, at the request of the retirant, to an age and service retirement at the appropriate time. Any member of PERS who has a minimum of five years of service credit and has not attained the age of sixty may apply for disability retirement benefits. The age limitation was incorporated in O.R.C. § 145.35 when the statute was adopted in 1933.

From approximately 1979 until 1984, June Betts ("Betts") was employed by the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB") as a speech pathologist. In 1984, because of acknowledged unsatisfactory job performance, Betts voluntarily accepted reassignment to a lesser position. In September of that year, apparently because of poor health, Betts became incapable of satisfactorily performing her new duties and once again voluntarily accepted reassignment to a less responsible position with lower pay.

By May 1985, Betts' job performance had deteriorated to such an extent that it was recognized she no longer could perform any work-related duties. Later that month, HCB informed Betts that it would have no choice but to initiate action to have her placed on unpaid medical leave. Neither

[2] *Pensions & Investment Age*, January 25, 1988.

[3] During calendar year 1984, PERS disbursed a total of $336,443,286.01 in age and service retirement benefits and $39,722,278.09 in disability retirement benefits.

HCB nor PERS possessed any authority to require Betts to retire.

As an alternative to medical leave, HCB noted that Betts was eligible for age and service retirement benefits from PERS. It was suggested that Betts consider applying, in which case she would receive a monthly pension allowance and uninterrupted health coverage.

On June 3, 1985, Betts, who was sixty-one years old at the time, voluntarily submitted to HCB a letter announcing her retirement. Later that month, Betts' attorney submitted to HCB an application for disability retirement rather than age and service retirement. This application was not forwarded to PERS until July 22, 1985, eight days after the simultaneous filing of an age discrimination charge with the Equal Employment Opportunity Commission ("E.E.O.C.") and her complaint in this matter. On the following day, Betts' attorney submitted to PERS an application for age and service retirement requesting that it be processed only if Betts' application for disability retirement could not be approved. Betts subsequently was notified by PERS that her application for disability retirement benefits could not be considered in light of the age limitation contained in O.R.C. § 145.35. Her application for age and service retirement benefits and health care coverage then was approved and processed.

On March 27, 1986, the United States District Court for the Southern District of Ohio, Western Division, granted Betts' motion for summary judgment and denied PERS' cross-motion for summary judgment on the ground that the provision in O.R.C. § 145.35 limiting eligibility to apply for disability retirement benefits to persons who have not attained the age of sixty violated the ADEA. (A-20.) The district court rejected PERS' argument that O.R.C. § 145.35 was a component of a "bona fide employee benefit plan" pursuant to 29 U.S.C. § 623(f)(2) and, therefore, exempt from the requirements of the Act.

The district court's holding was based on its determination that Betts had been involuntarily retired and constructively

discharged because she could not apply for disability retirement benefits. (A-30.) More important, however, it determined that O.R.C. § 145.35 did not qualify for the exemption under 29 U.S.C. § 623(f)(2) because distinctions in benefits offered to older and younger employees were not based on significant age-related cost considerations, as required by federal regulations. *See* 29 C.F.R. 860.120(a)(1). (A-28.)

A divided panel of the Sixth Circuit affirmed the decision of the district court. The appellate court held that the "critical factor" in rejecting PERS' claim that O.R.C. § 145.35 satisfied the requirements of § 623(f)(2) was that the different treatment of older and younger workers was not based on age-related cost considerations. As the Sixth Circuit noted, O.R.C. § 145.35 could pass muster only if older workers were denied the opportunity to apply for disability retirement benefits because of "a substantial business purpose." (A-5.)

The majority reached that conclusion only after determining that when 29 U.S.C. § 623(f)(2) was amended in 1978, "Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H.R. Conf Rep. No. 95-950, 95th Cong., 2d Sess. 8, *reprinted* in 1978 U.S. Code Cong. & Admin. News 504, 529."

A lengthy dissenting opinion (A-7) took exception with the district and appellate courts' rulings, implicitly rejecting the contention that the *McMann* decision had been legislatively overruled. (A-16.) The dissent concluded that O.R.C. § 145.35 satisfied the requirements of 29 U.S.C. § 623(f)(2) and that the decision of the district court should be reversed.

THE QUESTION PRESENTED IS SUBSTANTIAL

The Sixth Circuit's divided panel concluded that a bona fide employee benefit plan established under Ohio law prior

to the passage of the ADEA must justify age-based distinctions in benefits by demonstrating the existence of an underlying substantial business purpose. This holding is in direct conflict with this Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), is contrary to the positions of other courts of appeals, and promotes an interpretation of federal law that requires revision of the nation's seventeenth, eighteenth, and one-hundred twenty-fifth largest retirement systems.[4] The Sixth Circuit's unprecedented interpretation of 29 U.S.C. § 623(f)(2), a frequently litigated provision of the ADEA, warrants this Court's full attention.

A. Pre-existing Benefit Plan As A Subterfuge.

At all times relevant, the ADEA has contained an exemption from its proscriptions for "bona fide employee benefit plans." *See* 29 U.S.C. § 623(f)(2). Until 1978, this exemption provided that

> [i]t shall not be unlawful for an employer, employment agency, or labor organization -
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

In *McMann*, the only Supreme Court case interpreting the exemption, it was determined that 29 U.S.C. § 623(f)(2) permitted involuntary retirement. Of greater significance to

[4] Although PERS is the only retirement system named in this lawsuit, the State Teachers Retirement System of Ohio, *see* O.R.C. § 3307.42, and the School Employees Retirement System of Ohio, *see* O.R.C. § 3309.39, have disability retirement provisions identical to the PERS provision, O.R.C. § 145.35, invalidated by the Sixth Circuit.

the case at bar, the *McMann* Court held that a plan in existence prior to the passage of the ADEA could not be a subterfuge to evade the purposes of the Act and an employer did not have to demonstrate that a business or economic purpose served as the basis for distinctions in benefits between older and younger workers. *McMann*, 434 U.S. at 203.

In 1978, Congress responded to the *McMann* decision by amending 29 U.S.C. § 623(f)(2) to prohibit involuntary retirement. Congress did not, however, add any language to the exemption to indicate dissatisfaction with *McMann* in respect to the issue of subterfuge.[5]

In the case at bar, the Sixth Circuit, nevertheless, has determined that "[i]n amending section 623(f)(2), Congress expressly repudiated the Supreme Court's decision . . . that a bona fide benefit plan that treated older workers differently and predated the Act need not be justified by any business purpose." (A-4.) (Emphasis added.) The "express" repudiation relied on by the Sixth Circuit is found not in the Act itself, but in legislative history.

Under ordinary circumstances, reliance on legislative history to override unambiguous statutory language is unorthodox. *See McMann*, 434 U.S. at 199. It is extraordinary under the facts of this case because it must be presumed that Congress ratified this court's interpretation of "subterfuge" when, in 1978, the legislature amended 29 U.S.C. § 623(f)(2) to prohibit involuntary retirement, but did not change any of the language dealing with subterfuge. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278-

[5] 29 U.S.C. § 623(f)(2) was amended to add the following phrase:

> and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .

79 (1977) (Congress ratifies legislation when that legislation is re-enacted in substantially the same form).

Other courts have adopted a position exactly opposite to that of the Sixth Circuit in respect to the proper interpretation of the effect of the 1978 amendment. The Court of Appeals for the Ninth Circuit, for example, has stated that

> [d]espite broad language in the legislative history, the 1978 amendment to . . . [section 623(f)(2)] only dealt with involuntary retirement provisions. Congress could have easily invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted [29 U.S.C. § 623(f)(2)] without amending the subterfuge language.

E.E.O.C. v. Orange County, 837 F.2d 420, 422 (9th Cir. 1988). (Citations omitted.)

The Ninth Circuit is not alone in its opinion that the *McMann* decision enjoys continuing vitality in its application to the definition of subterfuge. The First, Second, Fifth, Seventh, and Eighth Circuits have all either issued or affirmed decisions consonant with that of the Ninth Circuit. *See E.E.O.C. v. Maine*, 644 F. Supp. 223, 226 (D.Me. 1986), *aff'd. mem.*, 823 F.2d 542 (1st Cir. 1987); *E.E.O.C. v. Home Insurance Company*, 672 F.2d 252, 258 (2d Cir. 1982); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *Gonsalves v. Catepillar Tractor Co., Inc.*, 634 F.2d 1065, 1066 (7th Cir. 1980); *International Brotherhood of Electrical Workers, Local 1439 v. Union Electric Co.*, 585 F. Supp. 261, 264 (E.D. Mo. 1984), *affd.*, 761 F.2d 1257 (8th Cir. 1985).

The *Maine* decision is particularly instructive because it involved an employee benefit plan very similar to O.R.C. §

145.35.[6] The district court's decision, adopted by the First Circuit, parallels the position espoused by the Ninth Circuit and provides a striking contrast to the holding of the Sixth Circuit:

> The [1978] amendment . . . left undisturbed the *McMann* Court's interpretation of the terms "*bona fide*" and "subterfuge." . . . If Congress had wished to state that a plan's chronology alone would not satisfy the "subterfuge" prong of section [623(f)(2)], it could have plainly said so. Since Congress' language merely prohibits the involuntary termination of any worker under an exempt retirement plan, the Court assumes that Congress meant no more than it expressly stated.

Maine, 644 F. Supp. at 226. The *Maine* Court also concluded that the legislative history did not support the proposition that Congress intended to legislatively reverse *McMann's* holding on the issue of subterfuge. 644 F. Supp. at 227 n. 5.

Although the *Maine* case was brought to the attention of the Sixth Circuit, the majority's decision includes no mention of it[7] or any of the other cases previously referred to in which 29 U.S.C. § 623(f)(2) is discussed. This dichotomy between the Sixth Circuit decision and the decisions of other appellate courts, separate and apart from the obvious conflict between the *McMann* decision and the decision in the instant case, offers compelling justification for plenary review of this matter by this Court.

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[6] The United States District Court of Kansas has also upheld the legality of a plan with an age restriction similar to the one contained in O.R.C. § 145.35. *See E.E.O.C. v. Cargill, Inc.*, No. 81-4193 (D. Kan. Oct. 12, 1984), *appeal docketed*, No. 84-2692 (10th Cir. Dec. 10, 1984).

[7] The relevance of the *Maine* decision is discussed by the dissent in this case.

B. Benefit Plans In General

The broader question in this case concerns the type of evidence that must be offered by an employer in order to demonstrate the absence of subterfuge. The Sixth Circuit placed heavy reliance on 29 C.F.R. 860.120(a)(1) and (f)(1)(iii),[8] which provide that the absence of subterfuge may be demonstrated only by the existence of age-based cost considerations. (A-40.) Yet these administrative regulations, like the Sixth Circuit's opinion that *McMann* was overruled in its entirety by the 1978 amendment to 29 U.S.C. § 623(f)(2), are not reflective of statutory language. To the contrary, they ignore this Court's pronouncement in *McMann* that subterfuge means "a scheme, plan, stratagem, or artifice of evasion." *McMann*, 434 U.S. at 203. The *McMann* definition of subterfuge at least implies an examination of subjective criteria, such as motive, not simply objective ones such as age-based cost considerations. As noted by the concurrence in *E.E.O.C. v. City of Mt. Lebanon*, 842 F.2d 1480, 1495 (3rd Cir. 1988) (Hutchinson, J., concurring), 29 U.S.C. § 623(f)(2) "contemplates . . . a good faith defense" which is improperly restricted by an "emphasis on the objective criterion" demanded by federal regulations.[9]

Admittedly, the view expressed by the concurring judge in *Mt. Lebanon* was not shared by his brethren. But neither has every circuit embraced the majority's position in that decision which implies that cost considerations must be actuarily based. *See, e.g., Cipriano v. Board of Education of City School District*, 785 F.2d 51, 54 (2nd Cir. 1986) (federal regulations do not require that "cost considerations . . . be actuarily based"). Indeed, both the Second Circuit in *Cipriano* and the Ninth Circuit in *Orange County* expressed

[8] These provisions of the Code of Federal Regulations have been recodified at 29 C.F.R. § 1625.10(a)(1) and (f)(1)(iii).

[9] The dissent in the instant matter noted how the relevant regulations "add a dimension, economic cost justification, not in the statute." (Wellford, J., dissenting.) (A-18.)

reservations concerning the faithfulness of these regulations to the letter of the law. *See* 785 F.2d at 58 ("we do not wish to be understood as endorsing every detail of the regulations"); and 837 F.2d at 422 n. 2 (court "must consider whether the regulation represents a 'reasonable construction of' statute"), respectively. Moreover, the notion that an employer is restricted to a presentation of objective data to dispel an accusation of intentional discrimination fosters an unduly narrow interpretation of statutory language which, it must be assumed, was intended by Congress to be given "its ordinary meaning." *McMann*, 434 U.S. at 203. Thus, the Sixth Circuit's holding that objective criteria alone are available to an employer for purposes of disproving that a provision of a bona fide employee benefit plan was not designed to evade the Act is inconsistent with the usual rules of statutory construction and results in a distortion of the analysis that should be applied to cases in which the question of subterfuge arises. Because the issue of subterfuge is a commonly disputed element in any inquiry into the application of 29 U.S.C. § 623(f)(2), the Sixth Circuit's reliance on federal regulations to expand the scope of 29 U.S.C. § 623(f)(2) has ramifications not only for the parties and the majority of Ohio's public employees, but for every pension system that distinguishes between older and younger employees in respect to the type or level of benefits available. The Sixth Circuit's decision, therefore, is of such significance that it deserves the full consideration of this Court.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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1. 29 C.F.R. 860.120(a)(1) A-40
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*The opinions of the Sixth Circuit and district court have been reproduced verbatim, including any typographical errors.

Opinion of the United States Court of Appeals for the Sixth Circuit
(Reported at 842 F.2d 692)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-3676/4034

Decided and Filed June 3, 1988

* * *

JUNE M. BETTS,
Plaintiff-Appellee,

v.

HAMILTON COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
AND
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Defendants-Appellants.

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the court, in which MERRITT, Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 7-19) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Defendants Hamilton County Board of Mental Retardation and Developmental Disabilities and Public Employees Retirement System of Ohio appeal from an order granting June Betts' motion for summary judgment and declaratory judgment in this age discrimination case.

Betts worked for the Mental Retardation Department of Hamilton County and was covered by the state retirement system and the Age Discrimination in Employment Act, 29 U.S.C. § 621-34. Her work degenerated because of medical problems until she became disabled at age sixty-one. After negotiations, she was given the choice of two alternatives: an unpaid medical leave or length of service retirement. She was not offered disability retirement as a third choice. She was not allowed to have a disability pension because of a provision in Ohio's pension law preventing persons over sixty from receiving disability pensions and allowing them only to receive regular age retirement pensions.[1] Betts accepted length of service retirement and now receives $158.50 per month in benefits. A similarly situated younger employee would have been entitled to a disability benefit of $355.02 per month.

In granting Betts' motion for summary judgment, the district court held that the plan violated the Act. The district court found that the plan was discriminatory on its face and in its effect and did not qualify for the bona fide employee benefits plan exception to the Act. Specifically, the district court concluded that the plan did not qualify under the exception because it is not the type of plan covered by the exception and because the defendants did not act in observance of the plan when they forced Betts into retirement because of her age.

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[1] Ohio Revised Code § 145.35 provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

Under 29 U.S.C. § 623(a)(1), an employer may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment. When there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2). In 1978, Congress further limited this exception by providing that plans that fall within the exception are nevertheless unlawful if they permit or require the involuntary retirement of an individual because of age.[2] In amending section 623(f)(2), Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann,* 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H. R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 529. In light of this legislative intent, the district court noted that the "critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors as set forth in the regulatory interpretation of that section." 631 F.Supp. 1198,

[2] Section 623(f)(2) now provides:

It shall not be unlawful for an employer . . .

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . . .

1204 (S.D. Ohio 1986). *See* 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii).[3] We agree. Under the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose. As the Seventh Circuit recently declared, "where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623(f)(2)]." *Karlen v. City Colleges of Chicago,* 837 F.2d 314, 319 (7th Cir. 1988). *Accord Equal Employment Opportunity Commission v. City of Mt.*

[3] 29 C.F.R. 860.120(a)(1) provides:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, [29 U.S.C. § 623(f)(2)] does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in [29 U.S.C. § 623(f)(2)], benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. 860.120(f)(1)(iii) provides:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.

Lebanon, Pennsylvania, No. 87-3189 (3d Cir. March 30, 1988), slip op. at 25-26 ("By adding § 623(f)(2), Congress intended to relieve employers of the burden of providing equal benefits to all employees only when the cost of providing lower benefits to older workers is approximately equal to the cost of providing greater benefits to younger workers.").

In her motion for summary judgment, Betts argued that the plan could not be justified by any business purpose. Under the disability plan, two employees with the same number of service years and the same final salary are treated identically unless one of the two employees is 60 or older. Betts argued that there was no economic justification for providing the younger employee with disability benefits while denying disability benefits to the older employee. To the contrary, Betts suggested that this arrangement is likely to cost the employer more because the employee who becomes disabled at a younger age should draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older.

Despite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty. Consequently, the district court reached its conclusion that "the benefit package . . . is not justified by significant cost considerations" without the benefit of having the issue fully briefed by both parties. The defendants now argue that, at a minimum, this court should remand the case to allow them to put evidence before the district court concerning age-related cost considerations. The defendants do not contend that the district court prevented them from presenting evidence of cost considerations. *Cf. Cipriano v. Board of Education of City School District*, 785 F.2d 51 (2d Cir. 1986). In fact, the record indicates that, despite Betts' arguments that the plan cannot be justified by cost considerations, the defendants made no effort to submit any evidence on the subject. Consequently, we have no choice but to affirm the district court's entry of summary judgment in favor of Betts; a non-moving party who, in the face of a motion for summary judgment, makes no effort to satisfy his burden of production

is not entitled to a second opportunity to satisfy his burden once the motion has been granted.

Finally, we find that the district court did not abuse its discretion in awarding attorney's fees.

The judgment of the district court is affirmed.

WELLFORD, Circuit Judge, dissenting.

This is a difficult case in which plaintiff desires to obtain disability benefits which would give her a greater amount than would retirement benefits which she contends she was forced to seek. Betts was physically incapable of continuing public employment at age 61, and had only five years of active service with her employer at the time of retirement. She contends that the practice of defendants and their plan which carries out an Ohio statutory requirement violates the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.).

The defendants maintain that the plaintiff voluntarily retired due to her diabetic condition, and thus has no basis for her action asserting age discrimination. They also contend that Betts chose to retire instead of undergoing a medical examination, the result of which may have given the parties other options less favorable to Betts than forced retirement. Defendants also maintain they are carrying out the terms of a bona fide employee benefit or retirement plan which is exempt from ADEA requirements. (29 U.S.C. § 623(f)(2)). Defendants assert, in addition, that if plaintiff were, in effect, discriminated against under the present law and regulations, defendants' practice under the plan in question pre-existed ADEA and is lawful. To put it another way, discrimination, if any, was due to length of service rather than age and was thus not in contravention of ADEA. PERS, moreover, contends that it is not an "employer" within the meaning of ADEA, and thus should not, in any event, be liable for imposition of plaintiff's attorney fees. I agree with the

contentions of the defendants and, therefore, dissent from the view of other members of the panel.

The district court concluded that the plan was discriminatory on the basis of age, although in some respects it appeared to be justified. The district court also found that the claimed exemption from ADEA sought by the defendants did not apply. The Equal Employment Opportunity Commission has intervened and was permitted to participate by brief and by argument. It supports the position of the plaintiff. Defendants challenge the regulatory interpretation relied upon by the district court, 29 C.F.R. 860.120(a)(1)(1979)[1], in its decision published at 631 F. Supp. 1198 (N.D. Ohio 1986). The district court discussed this regulatory interpretation in considering "the critical factor in our determination of whether defendants' plan is the type of plan exempted [under ADEA] . . . based upon age-related cost factors." *Id.* at 1204. Not surprisingly the EEOC's brief supports its "guidelines" which it contends are in accord with its regulatory interpretation and which it asserts provides "that an employer can demonstrate that a plan provision is 'not a subterfuge' and is consistent with the Act's purpose, by showing that 'the lower level of benefits is justified by age-related cost considerations.' 29 C.F.R. 860.120(d)."

Betts filed an original complaint in this case on June 14, 1985, on the same day that she filed her charge against defendants. 29 U.S.C. § 626(d) provides, in pertinent part, that "[n]o civil action may be commenced by an individual

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[1] 29 C.F.R. 860.120(a)(1) provides in part:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." The original complaint obviously was not in compliance with § 626(d). Plaintiff, however, filed an amended complaint of similar import on October 9, 1985, more than 60 days after the filing of her charge. We have ruled that the above 60 day provision along with 29 U.S.C § 633(b) comprise "substantive limitations on the rights of plaintiffs, . . . are analogous to statutes of limitations . . . [and] ADEA's filing and deferral provisions specify a time before which no action may be brought." *Whitfield v. City of Knoxville*, 756 F.2d 455, 461 (6th Cir. 1985). *See also Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983), *cert. denied*, 465 U.S. 1102 and 467 U.S. 1226 (1984) ("Congress intended conciliation efforts under § 626(d) to be a strict condition precedent to the initiation of any litigation in federal courts," and "an absolute period of abstention by the federal judiciary.") The contemporaneous filing of the original action together with the ADEA charge was clearly barred by § 626(d). There is a serious question as to whether plaintiff cleared this ADEA hurdle by later filing, after 60 days had expired, a similar amended complaint. The district court and the majority have not addressed this jurisdictional problem, which may be a basis for dismissal.

Plaintiff's application for disability retirement was denied under the following language of Ohio Rev. Code § 145.35:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program.

(Emphasis added.)

As observed by the district court, the defendants' disability retirement plan "provides that a retirant shall receive a

retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. *See* Ohio Rev. Code § 145.36." 631 F. Supp. at 1202. ADEA § 623(a)(1) precludes discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The district court concluded that defendants' retirement plan had a "disparate impact" upon individuals such as plaintiff despite its finding that there was no "ill will" directed towards plaintiff "or anyone in the protected group," and despite its observation that "at first glance, the plan appears to be eminently just." *Id.* at 1202. The district court conceded that such disparate impact occurred only in the situation where one sixty years or older had not accumulated sufficient "voluntary" retirement benefits by reason of length of service to attain thirty percent of final salary.

The district court also concluded that the exception under 29 U.S.C. § 623(f)(2)[2] did not apply. Giving "great deference" to EEOC guidelines, including 29 C.F.R. 860.120(f)(1)(iii),[3] the court held that because the plan denied "long term disability benefits on the basis of age," defendants could not prevail. *Id.* at 1203. Defendants' argument that its plan afforded a "legitimate retirement option," and was therefore exempted, was not specifically addressed by the district court because "even if the benefit package merely permits an age-based reduction," it was held not to be "the type of plan contemplated by the exemption." *Id.* at 1204. The district court analogized plaintiff's position of "forced retirement" to that of "constructive discharge" despite plaintiff's concession that she was faced with options to retire or be terminated because of "poor job performance" and "apparent medical problems." *Id.* at 1204. Also, because the plan did

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[2] 29 U.S.C. 623(f)(2) provides, in part:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . .

[3] 29 C.F.R. 860.120(f)(1)(iii) provides in part:

> [W]here employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. . . .

not contain an "express provision for involuntary retirement, at the employer's option", before attaining age seventy, the district court held that defendant employer "did not observe the terms of the plan when it forced plaintiff to retire." *Id.* at 1205.

Applying Title VII criteria to this action, and citing *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976) and *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971), the district court held that PERS was an employer within the meaning of the act, although not one "in conventional terms . . . because it controls some aspects of plaintiff's compensation . . . and privileges of employment." *Id.* at 1206. Both defendants appeal the consequent grant of summary judgment to plaintiff, although PERS did not pursue on appeal the question of its employer status under ADEA.

Other courts have recently considered the interesting questions presented in this appeal. See *EEOC v. State of Maine and Maine State Retirement System*, 823 F.2d 542 (1st Cir. 1987) (affirming without opinion the district court's dismissal of an ADEA claim where members of the plan, state employees, were similarly restricted from retirement disability benefits unless permanently disabled before reaching age sixty, see *EEOC v. State of Maine, et al.*, 644 F. Supp. 223 (D. Me. 1986)). These decisions in the *State of Maine* case were not available to Judge Speigel whose opinion pre-dated them. See also *Foster v. Board of Trustees of the Maine Retirement System*, No. CV-86-24 (Maine Super. Ct. Aug. 6, 1986).

A similar result was reached in a case involving like challenge to a group life insurance program which provided disability benefits only to employees who became disabled prior to reaching age sixty. See *EEOC v. Cargill, Inc.*, No. 81-4193 (D. Kan. Oct. 12, 1984), *appeal docketed*, No. 84-2692 (10th Cir. Dec. 10, 1984). In *Cargill*, District Judge Saffels considered amended § 623(f)(2) of ADEA in light of its legislative history and concluded that the plan at issue was not a "subterfuge" and was bona fide despite the fact that

Cargill's plan had been amended after the passage of ADEA, but not in respect to the disability feature. (A similar contention is made by Betts that defendants had amended the plan in question after ADEA became effective). The district court in *Cargill* granted defendant summary judgment holding that the provision in question "was instituted in good-faith prior to the passage of ADEA."[4] See also *International Bhd. of Elec. Workers v. Union Elec. Co.*, 585 F. Supp. 261 (W.D. Mo. 1984), *aff'd* 761 F.2d 1257 (8th Cir. 1985) and *Alford v. City of Lubbock, Texas*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) for the proposition that a plan, adopted before ADEA came into effect, which might seem on its face to discriminate against older employees was deemed not to be a subterfuge within the meaning of § 623(f)(2) citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The majority does not address these cases dealing with this statutory provision.

No disparate treatment nor intentional discrimination on the part of defendants has been demonstrated in this case.[5] The court concluded rather that "defendants' disability retirement plan has a disparate impact upon individuals in the protected age group." 631 F. Supp. at 1202. The district court did note that the purpose and effect of the plan was to deny "benefits to certain employees because they are sixty years of age or older." *Id.* at 1202, citing *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). *Borden's* involved a plant closing and whether certain employees fifty-five or older were discriminatorily denied severance pay under ADEA. Two questions were presented, the first "whether Borden's policy of denying severance pay to employees eligible for retirement" violated ADEA, and the second, "whether Borden's severance pay policy qualifies

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[4] *Cargill* has been appealed to the Tenth Circuit Court of Appeals and oral argument has been heard. No decision has yet been rendered.

[5] The district judge noted no "ill will" by reason of age demonstrated; that the plan "preserved career opportunities" and in some respects "appears to be eminently just." 631 F. Supp. at 1202.

for the 'bona fide employee benefit plan' exception under . . . 29 U.S.C. § 623(f)(2)." *Borden's*, 724 F.2d at 1392. The *Borden's* court found disparate treatment in addition to affirming the district court's disparate impact analysis because "Borden's purposefully drafted its severance pay policy," 724 F.2d at 1393, and held that there was no further need to show a discriminatory animus, citing other Ninth Circuit decisions. Such a holding necessarily examines the impact of a plan upon a particular employee or group of employees of a certain age, and implies a discriminatory animus or intent from the adoption of language in a plan that sets forth eligibility for severance benefits based upon age or length of service. The *Borden's* court acknowledged that the retirement benefits afforded the claimants were of greater value than the severance pay which was granted to employees who were not entitled, because of their younger age, to retirement benefits. The plant closing in *Borden's* brought about a *forced retirement of termination of all employees* there situated at the time of closure. That economic factors may have motivated the actions of the employer and its plan policies were deemed immaterial "since Borden is not arguing that its policy was economically necessary", *id.* at 1394. The other basis for decision in *Borden's* was that the "severance pay policy" in question was "not a 'plan'" within the meaning of § 623(f)(2), because it was a "one-time, ad hoc cash payment." *Id.* at 1395, 1396. I find *Borden's* rationale unpersuasive, and conclude that it does not apply to the very different set of circumstances involved in this case where the policy at issue is clearly that involved in an ongoing plan, not just a "one-shot, ad hoc" action outside the "meaning of § 623(f)(2)" as found in *Borden's*.

The district court concluded that the plan in question did not qualify for the § 623(f)(2) exemption because it did not meet certain of the following required criteria which it found must be established:

> (1) it must be the sort of "plan" covered by the exemption;

> (2) it must be "bona fide," which means that it exists and pays substantial benefits;
>
> (3) the defendants' act must be in observance of its plan;
>
> (4) the plan must not be a subterfuge to evade the purposes of the act.

631 F. Supp. at 1203. The district court found the plan to be a bona fide one. It was a "bona fide employee benefit plan," of the kind defined in 29 U.S.C. § 623(f)(2).

However, the district court found that the action taken with regard to Betts was akin to a constructive discharge and that this action ("involuntary retirement") was not a part of the terms of the plan, thus defendants had not "observed" the plan, another of the four criteria.

It is clear, however, that Betts was not rendering satisfactory service in the several positions in which she had been placed during her approximate five years of service. She knew that she faced the potentiality of a forced medical leave under the terms of her employment and the established policy of the defendant employer. She was given an option, on the other hand, under the plan "to voluntarily retire and continue to have medical benefits." See Stipulation #10. Betts had ten days to make a decision after being furnished information about the options available to her. Her daughter was also fully advised about the options under the plan. It was further stipulated that age was not a factor in the decision about requiring a medical examination and the potentiality of a forced medical retirement. The constructive discharge analogy is inappropriate as herein pointed out.

The fact that a "forced" medical retirement might have been one option available to Betts, due not to her age but rather her condition of health, and that another retirement option was available to her which she voluntarily chose in which the amount of benefits depended primarily upon length

of service, is the significant consideration. I would find that the retirement involved in this case was a voluntary one.

Even if there were found a discriminatory impact upon Betts, a constructive discharge analogy is simply not appropriate in this case. This is not a case of difficult, unpleasant or intolerable working conditions being imposed upon plaintiff. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991 (6th Cir. 1984).

The Board's actions as an employer did not constitute an equivalent to a "constructive discharge" of Betts; its actions were "in observance of its plan." The district court's contrary conclusion was in my view erroneous. Therefore, I would conclude that defendants did meet the criterion of observing, and not departing from, the terms of its plan.

For the reasons stated in the *Cargill* and *Maine* cases, and because the plan, when adopted and as implemented, was bona fide and not a "cover" or a scheme to discriminate by reason of age against employees in the position of plaintiff, I would further conclude that it was not a "subterfuge to evade the purposes" of ADEA. The definition of "subterfuge," in § 626(f)(2), is a "scheme, plan, strategem, or artifice of evasion" as set out in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. Since defendants' plan was adopted long before ADEA became law, it was not a subterfuge to evade old age discrimination. The third of the criteria was met in that respect.

The final criterion necessary for a plan to come within the exemption of 29 U.S.C. § 623(f)(2) is whether this was the "sort of 'plan' covered by the exemption." 631 F. Supp. at 1203. *Borden's*, a principal authority relied upon by the district court, which considered a "one shot" severance pay arrangement, has been distinguished. Another principal authority cited by the district court in finding the plan in question not to be the "sort" intended by § 623(f)(2) is *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). In *Westinghouse*, the court

concluded that the layoff income benefit denied to workers at least 55 years of age was "functionally independent of the Pension Plan," because "[t]he mere fact that benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB, however, does not merge the two plans into a single 'coordinated benefit plan.' *EEOC v. Borden's Inc.*, 551 F. Supp. 1095, 1099 (D. Ariz.) *appeal docketed*, No. 83-1701 (9th Cir. Feb. 17, 1983)." 725 F.2d at 225. *Westinghouse* is also distinguishable. In the instant case, there was a coordinated plan and policy tied to a determination of benefits which a medically disabled worker might seek. The amount of the benefit in this case was essentially tied to an employee's length of service with the employer; it obviously sought to encourage long term employment, and it was not designed to discriminate against the hiring of an older worker, as evidenced by the defendant's hiring of Betts at age 55. Defendants' retirement benefit plan is the sort of plan contemplated by 29 U.S.C. § 623(f)(2), contrary to the conclusion of the district court. See *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). *Alford v. City of Lubbock, Texas* 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) is not to the contrary because withholding of older employees' accumulated and accrued 90-day sick pay benefits is not comparable to the disability retirement plan and policy here involved.

EEOC and the district court find support for finding a violation of ADEA because of 29 C.F.R. 860.120(a)(1) and 29 C.F.R. 860.120(f)(1)(iii). Their position is that the limitation imposed upon disability retirement benefits under the plan "is not justified by significant cost considerations and therefore . . . is not the type of plan contemplated by the [§623(f)(2)] exemption.". 631 F. Supp. at 1204.

The two regulations make reference to "significant cost considerations" in order to justify "age-based reductions in employee benefits plans" or denying benefits to "employees who are disabled at older ages." The statutory exemption itself, 29 U.S.C. § 623(f)(2) sets out, in essence, only that there be a "bona fide seniority system or any bona fide employee benefit plan . . . not a subterfuge to evade the

purpose of [the Act]" and that such plan not "require or permit . . . involuntary retirement . . . because of . . . age." Under the statute the plan at issue is bona fide and not a subterfuge set up to evade ADEA. The plan did not require or make reference to age-based involuntary retirement; rather Betts was afforded a choice or option under the plan and the policy of defendants, and her benefits were less than others because of her comparative short length of employment service rather than age per se. Compare the plan in *TWA v. Thurston,* 469 U.S. 111 (1985). The plan in question did not, unlike the *TWA* plan, permit defendants involuntarily to retire Betts. It did permit a medical layoff if her state of health was insufficient to allow her to work satisfactorily, subject to medical treatment or possible curative effect of time, with right of reinstatement. The plan did not involve involuntary retirement as contended by Betts.

In sum, the plan meets the requirements of § 623(f)(2), because it is bona fide, not a subterfuge to evade ADEA, and does not involve the forced retirement of Betts, as was the situation involved in *EEOC v. Chrysler Corp.,* 733 F.2d 1183, *reh'g denied,* 738 F.2d 167 (6th Cir. 1984), another case relied upon by plaintiff. In *Chrysler,* forced retirees were not permitted to have the option available to younger employees (under 55 years old) of "layoff status." *Chrysler* held that forced retirement, imposed on older employees only, with no other option available, by reason of "economic necessity," constituted a violation of ADEA under the facts of that case. *Chrysler* involved employees with at least ten years of service. As pointed out by defendant PERS, an age and service retirement under Ohio law is granted the option of quitting retirement and returning to service with any public employer in Ohio, including, but not limited to defendant employer. See Ohio Rev. Code § 145.381. Defendants therefore, unlike the *Chrysler* and *TWA* cases, could not force Betts into permanent retirement since, under Ohio law, she could be reemployed by other State of Ohio agencies.

I conclude that neither regulation relied upon by the district court and by Betts is in accord with statutory purpose and adds a dimension, economic cost justification, not in the

statute. I agree, therefore, with *EEOC v. State of Maine, supra,* and with *EEOC v. Cargill,* that a plan of this type does come within the exemption of 29 U.S.C. § 623(f)(2), and, therefore, does not violate ADEA. This plan falls within this plain statutory exemption language without the need to analyze legislative history.[8]

Since I conclude that the plan in question does not constitute a violation of ADEA, I would set aside any award of attorney fees to Betts' counsel.

I would therefore REVERSE the decision of the district court for the reasons indicated.

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[8] If, however, one were to examine the legislative history of the 1978 amendment, reflected in § 623(f)(2) as set out in note 2, supra, one would find that the purpose was to preclude involuntary retirement on account of age. To that extent Congress intended to overrule *United Air Lines, Inc. v. McMann,* 434 U.S. 192 (1977).

Opinion and Order of the United States District Court, Southern District of Ohio, Western Division
(Reported at 631 F. Supp. 1198)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

No. C-1-86-1108

Filed March 27, 1986

* * *

JUNE BETTS,

Plaintiff,

v.

HAMILTON COUNTY BOARD OF
MENTAL RETARDATION, et al.,

Defendants.

* * *

OPINION AND ORDER

SPIEGEL, J.:

This matter came on for consideration of the motion for summary judgment and declaratory judgment filed by plaintiff (doc. 6), memorandum in opposition by defendant Hamilton County Board of Mental Retardation and Developmental Disabilities (HCBMRDD) (doc. 10), and by defendant Public Employees Retirement System of Ohio (PERS) (doc. 11), supplement to memorandum in opposition by defendant PERS (doc. 12), reply memorandum to documents 10 and 11 by plaintiff (doc. 14), reply memorandum by defendant HCBMRDD (doc. 22), and supplementary memorandum on summary judgment by plaintiff (doc. 18). The defendants PERS and HCBMRDD have also filed their cross-motions

for summary judgment (docs. 21 and 26) to which plaintiff has filed her memorandum in opposition (doc. 28) and the defendant PERS has filed its response (docs. 29 and 30).

This is an action for lost benefits and payment of attorney fees arising out of an alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* which provides in part:

> § 623(a) It shall be unlawful for an employer
>
> —
>
> (1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

Plaintiff alleges that defendants HCBMRDD and PERS violated the above-quoted section of the ADEA by compelling plaintiff to involuntarily retire by denying her disability retirement benefits because of her age.

Defendants make the following assertions in their responses to plaintiff's motion for summary judgment and in their own motions for summary judgment. First, defendants maintain that plaintiff voluntarily retired in June 1985 and that such voluntarily retirement precludes an action for age discrimination. Defendants argue plaintiff voluntarily chose to retire instead of undergoing a medical examination to prove the need for placing her on a medical leave of absence and therefore, age was not a factor in the events giving rise to this litigation. Second, defendants maintain that even if plaintiff was discriminated against on the basis of age, its practice of denying disability retirement benefits to individuals sixty-years of age and over was consistent with the laws and regulations in effect in June 1985, that the disability retirement plan pre-existed the promulgation of the ADEA, and such discrimination is permissible under 29 U.S.C. § 623(f)(2) which provides:

> It shall not be unlawful for an employer, employment agency or labor organization —
>
> . . . (2) to observe the terms of . . . any bona fide employee benefits plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall . . . permit the involuntary retirement of any individual [40 years of age but less than 70 years of age] because of the age of such individual . .

Finally, defendant PERS maintains that it is not an "employer" for the purposes of the ADEA, and therefore, cannot be held accountable for any discriminatory practices.

In considering a motion for summary judgment, the narrow question we must decide is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied*, 444 U.S. 986 (1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.*, quoting Rule 56(c), Fed. R. Civ. P. Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.*

For purposes of the cross-motion for summary judgment, the following facts were stipulated. In addition, the parties have fully briefed the issues, provided the Court with the applicable sections of the Ohio Revised Code setting forth the public employee retirement system at issue, and have presented their positions through oral arguments before the Court.

Plaintiff was sixty-one years of age and a six-year member of PERS when she was denied disability retirement benefits. For approximately five years, plaintiff was employed as a speech pathologist for defendant HCBMRDD. In 1984, plaintiff was not satisfactorily performing her duties as a speech pathologist and voluntarily accepted a transfer to the Beckman Adult Center to be employed as a workshop specialist. By September 1984, plaintiff was unable to satisfactorily perform her new job duties, apparently due to medical reasons. As a result, she voluntarily accepted a position as a Teachers' Aid with defendant HCBMRDD at a lower salary. By late May 1985, plaintiff's apparent medical problems continued and she was unable to perform her duties as a Teachers' Aid. At that time, HCBMRDD supervisory staff advised plaintiff that she could choose to voluntarily retire within ten days or they would begin steps to force her to take a medical leave of absence. Voluntary retirement would provide plaintiff with $139.14 per month income and continued medical benefits, while forced medical leave was without pay or medical benefits.

Subsequently, plaintiff's daughter contacted HCBMRDD and inquired about the possibility of her mother obtaining disability retirement benefits. She was told that the defendant PERS should be contacted, as it alone makes the determination of eligibility for disability retirement. On June 3, 1985, plaintiff met with HCBMRDD personnel and reviewed the only options available to her; that is voluntary retirement or forced medical leave. That same date, she signed a letter stating her intention to retire. Eleven days later, plaintiff filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the defendants.

Shortly thereafter, plaintiff filed with HCBMRDD her application for disability retirement, a report of her attending physician indicating that she was permanently disabled, and a letter requesting HCBMRDD to disregard her letter of June 3, 1985. Plaintiff's application for disability retirement was denied pursuant to Ohio Rev. Code § 145.35 which provides in part:

> Medical examination for disability retirement; reinstatement of persons not disabled.
>
> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

The disability retirement plan provides that a retirant shall receive a retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. See Ohio Rev. Code § 145.36. Moreover, a disability retirant retains his membership status in PERS and is considered on leave of absence from his position during the first five years on the retired list. Within that period, he can be restored to his previous position and salary or to a similar position and salary. Ohio Rev. Code § 145.39. Had plaintiff qualified for disability retirement, she would have received $355.02 per month based upon thirty percent of her final average annual salary of $14,260.00 and would have been eligible for reinstatement at a comparable salary and position within the first five years of retirement in the event her disability ceased. To the contrary, plaintiff is receiving $158.50 per month on "voluntary retirement", based upon her six years of membership in the PERS and is ineligible for regular re-employment in any capacity pursuant to the voluntary and compulsory retirement provisions of Ohio Rev. Code § 145.32.

The ADEA forbids an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). There are two methods of proving age discrimination. The most easily understood type of discrimination is "disparate treatment" which is evident when the employer treats some people less favorably than others because of their age. In a disparate treatment case, proof of discriminatory motive is critical. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). A second method of proving age discrimination is by demonstrating that the use of a facially neutral employment practice or the use of subjective criteria had a disparate impact on individuals in the protected age group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Intent need not be shown in a discriminatory impact case. *International Brotherood of Teamsters v. United States*, 431 U.S. 324 (1977).

We conclude that defendants' disability retirement plan has a disparate impact upon individuals in the protected age group. On its face and in its effect, the disability retirement plan denies benefits to certain employees because they are sixty years of age or older and we may assume that the plan was purposefully drafted to have that effect. *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1983). That is not to say, nor do we find any evidence in the record, that there was any ill will on the part of the defendants toward plaintiff or anyone in the protected group because of their age. In that respect, we find that this is a difficult case. It may well be that the plan was designed to discriminate on the basis of length of services rather than upon age. For example, a sixty-year-old individual with thirty years of service, who would not be eligible for disability retirement benefits, may receive higher monthly benefits and fair better than a younger individual collecting disability retirement, based upon his accumulated voluntary retirement benefits. At first glance, the plan appears to be eminently just, as it provides disability benefits to those younger individuals who become permanently disabled and who would otherwise have no source of income during their disability. It also preserves

any career opportunities an individual has obtained through his employment during the first five years of his disability. In addition, a sixty-year-old permanently disabled individual, who has served the public for many years, would be sufficiently compensated through voluntary retirement. However, these virtues of the plan are diminished when similarly situated individuals, but for their age, are compared. For example, the plan discriminates between a fifty-nine-year-old or twenty-five-year-old permanently disabled individual with six years of service and a person sixty years of age or older with an identical disability, average annual salary, and length of service, because they would not receive identical monthly benefits or the option of returning to work if their disability ceases. The discrepancy in monthly benefits and lack of opportunity to return to work is based solely upon age, as the sixty-year-old individual is precluded from seeking the option of disability retirement. The important factor in our analysis is the disparate impact that defendants' disability retirement plan has upon individuals, such as plaintiff, who are in the protected age group and who have not accumulated sufficient retirement benefits to compensate for the denial of disability benefits, based solely upon their age. In that regard, the plan is discriminatory on the basis of age.

The foregoing conclusion, however, does not resolve the question before us, as some types of age discrimination are permissible under the ADEA. Our second inquiry is whether defendants' disability retirement plan qualifies for the "bona fide employee benefits plan" exception under the ADEA, 29 U.S.C. § 623(f)(2), which provides:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . . .

In order for defendants' plan to qualify under the exemption, it must been the following four criteria: (1) it must be the sort of "plan" covered by the exemption; (2) it must be "bona fide," which means that it exists and pays substantial benefits; (3) the defendants' act must be in observance of its plan; (4) the plan must not be a subterfuge to evade the purposes of the act. Finally, even if defendants' plan meets the four criteria, it may not "require or permit involuntary retirement of any such individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2).

A plan qualifies under the exemption if it is a retirement, insurance, or pension plan. However, that list is not exclusive. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Retirement, pension, and insurance are merely examples of the types of plans in which Congress intended to allow age distinctions. *EEOC v. Westinghouse Electric Corporation*, 725 F.2d 211, 224 (3d Cir. 1983). Contrary to complex, ongoing benefit schemes, simple fringe benefits such as severance pay policies, *see EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), lay-off insurance and benefits, *see EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 211, and payment for accrued unused sick leave, *see Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982), are not excepted under the exemption. *See also* 29 C.F.R. 860.120(a)(1). Moreover, the EEOC guidelines specifically prohibit denial of long term disability benefits

on the basis of age. 29 C.F.R. 860.120(F)(1)(iii).[1] Such an administrative interpretation of the ADEA is entitled to great deference. *Griggs*, 401 U.S. at 433. We find that the "disability retirement" plan in question here is difficult, at best, to categorize. On the one hand, defendants point out that their disability retirement plan continues indefinitely, and therefore, they argue, it is a legitimate retirement option, specifically exempted from the ADEA. On the other hand, we cannot ignore the fact that defendants' plan has the salient features of a disability plan, as a disability retirant must be permanently disabled or presumed to be permanently disabled and may be restored to his former position and salary if his disability ceases within five years. In essence, the disability retirant is considered on leave of absence for the first five years of his retirement. Ohio Rev. Code §§ 145.35 and 145.39. We find it unnecessary to determine whether the plan in question is a disability plan, excepted from the exemption, or whether it is a retirement plan, specifically covered by it. The critical factor in our determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors, as set forth in the regulatory interpretation of that section.

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply for

[1] 29 C.F.R. 860.120(F)(1)(iii) provides in part:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section . . . .

> example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

29 C.F.R. 860.120(a)(1).

Plaintiff argues that the exemption does not apply because the plan does more than reduce benefits, as individuals at a certain age are precluded from receiving disability retirement benefits altogether, and in any event, such "reductions" are not based upon significant cost considerations. Plaintiff argues that contrary to insurance and pension plans, it would cost no more to provide disability benefits to a sixty-one-year-old employee than a twenty-five-year-old employee, provided both had the same number of service years and final average salary. Indeed, a twenty-five-year-old retirant would receive much more in the way of monetary benefits over his lifetime than one who became disabled at sixty-one.

As to plaintiff's first argument, we are uncertain whether defendants' benefit package, when taken as a whole, does more than permit an age-based reduction in employee benefits. While persons sixty years of age and older are precluded from disability benefits, they are eligible for voluntary retirement. However, we do not reach that issue because we agree with plaintiff that even if the benefit package merely permits an age-based reduction, it is not justified by significant cost considerations and therefore, it is not the type of plan contemplated by the exemption.

As to the second requirement for qualifying for the exemption, an employee benefits plan is bona fide if it exists and pays substantial benefits. *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980). If defendants' plan

was the type of plan exempted by section 4(f)(2), we would have little difficulty concluding that it was bona fide.

However, we conclude that other requirements were not met because defendants' act was not in observance of the plan and the plan impermissibly requires or permits involuntary retirement on the basis of age. For purposes of our analysis, these two factors are closely related. Defendants contend that the central question in this litigation is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a factor in the actions taken by HCBMRDD against her personally. The thrust of their argument is that plaintiff was given the option of voluntary retirement or a medical leave of absence, solely because of her poor job performance due to apparent medical problems. Plaintiff does not dispute that fact. However, central to plaintiff's argument, and of utmost importance to our analysis, is the impact that defendants' disability retirement plan has upon individuals such as plaintiff who are in the protected age group. Because of plaintiff's age, she was presented with two options rather than three. Those options were "voluntary retirement" or forced medical leave. The former option provides retirement and medical benefits. The latter option provides neither. We conclude that the situation is analogous to constructive discharge which arises when working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. *See Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir. 1977). In essence, plaintiff was presented with a choice of early retirement or nothing (a livelihood or none), and we therefore conclude that plaintiff was forced into retirement because of her age.

In 1978, section 623(f)(2) was amended in part, to include the following language:

> and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

> 29 U.S.C. § 623(f)(2) as amended, Pub. L. 95-256 § 2(A), Apr. 6, 1978, 92 Stat. 189.

The amendment to the ADEA, forbidding forced early retirement in essence overruled the Supreme Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a bona fide plan, even if the sole basis for early retirement is age. *See EEOC v. Chrysler Co.*, 733 F.2d 1183, 1185 (6th Cir. 1984). We conclude that the amendment should be applied to this case because plaintiff retired in 1985 and we are to apply the laws as it stood when the controversy arose. *Carpenter*, 635 F.2d at 580. Having concluded that the plan requires or permits the involuntary retirement of an individual because of his age, we need not address the issue of whether or not the plan is a subterfuge to evade the purposes of the ADEA.

However, we note that even if this controversy had arisen prior to the 1978 amendment, the exemption would not apply because defendants did not act in observance of the plan. Congress' intent in enacting section 4(f)(2) was to permit involuntary termination only if the employee benefit plan specifically provides for it. *Sexton v. Beatrice Foods, Co.*, 630 F.2d 478 (7th Cir. 1980).

> [A]n employer does not observe the terms of the plan unless the plan expressly sanctions the decision to force the employee to retire early as well as the decision to pay him substantial benefits. Both of these decisions must be pursuant to some express provision in the plan if the employer wishes to claim that he observed the terms of the plan by forcing an employee to retire early.

Id. at 486.

Under the PERS, the normal retirement date is the thirtieth day of June of any year a member of the system has attained the age of seventy. A member who has passed his sixtieth

birthday and has five or more years of total service credit, may elect early retirement. However, the PERS does not contain an express provision for involuntary retirement, at the employer's option, before an employee attains the age of seventy. Therefore, the employer did not observe the terms of the plan when it forced plaintiff to retire.

For the foregoing reasons, we conclude that the disability retirement plan conflicts with, and is in violation of the ADEA. In 1974, the ADEA was amended to extend coverage to state and local employees.[2] In *EEOC v. Wyoming*, ____ U.S. ____, 103 S. Ct. 1054 (1983), the Supreme Court held that the extension of the ADEA to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause and is not precluded by the Tenth Amendment. *Id.* To the extent that the 1978 ADEA amendments conflict with existing state statutes, the Supremacy Clause dictates that federal law prevail. *Orzell v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 752 (7th Cir. 1983).[3]

Finally, we must determine whether PERS is an "employer" within the meaning of the ADEA, and therefore, can be held liable for discriminatory practices on the basis of age. PERS

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[2] *See, e.g.*, H.R. Rep. No. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2850 ("The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment."); 120 Cong. Rec. 8768 (1974) (remarks of Senator Benson) ("The passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector.").

[3] *See also* 29 C.F.R. § 1625.6(c) (1981 Supp.):

> Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the Act.

argues that it cannot be defined as an employer because it is independent of HCBMRDD and is only involved to the extent that it receives county contributions to the public employees retirement system pursuant to Ohio Rev. Code § 145.48.

The ADEA, *inter alia*, prohibits employers from discriminating on the basis of age. Employer is defined to include a person engaged in an industry affecting commerce employing a specified number of employees for a specified period of time, and any agent of such person. 29 U.S.C. § 630(b). Plaintiff asserts that criteria employed in determining liability under Title VII of the 1964 Civil Rights Act should be applied to cases arising under the ADEA. In *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976), our parent circuit noted that the "ADEA is an offspring of the Civil Rights Act of 1964" and that "[t]he prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964, except that 'age' has been substituted for 'race, color, religion, sex or national origin.' . . ." and therefore, "[A]n analogous application of such standards should not be disregarded." *Id.* at 686 (citations and footnotes omitted). Accordingly, we conclude that adopting the Title VII criteria for purposes of this case is appropriate.

The Sixth Circuit has held that "Title VII . . . should not be construed narrowly." *Tipler v. du Pont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). For purposes of Title VII, the term "employer" "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." *Spirit v. Teachers Insurance and Annuity Assoc.*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979). *See also EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256

(N.D. Ohio 1981).[4] In this case, defendant PERS does not deny that it is vested with the general administration and management of the Public Employees Retirement System and that it denied plaintiff's application for disability retirement in accordance with the provisions of Ohio Rev. Code § 145.35. Therefore, we conclude that PERS is an employer for purposes of the ADEA because it controls some aspects of plaintiff's compensation, terms, conditions, and privileges of employment.

Accordingly, plaintiff's motion for summary judgment and declaratory judgment (doc. 6) is granted, the cross-motions for summary judgment by defendant PERS (doc. 21) and by defendant HCBMRDD (doc. 26) are denied.

This matter is set for a status conference on May 2 at 3:00 P.M., 1986 to discuss further proceedings consistent with this opinion.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

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[4] *See Cannon v. State of Delaware*, 523 F. Supp. 341 (D.Del. 1081) (Personnel Commission may be held liable under Title VII as agent of state, responsible for supervising the operation of the merit system); *Hannah v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981) and *Probe v. State Teachers' Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981) (State Teachers' Retirement Systems held to be employers of contributors or members for purposes of Title VII.

NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 86-3676

JUNE M. BETTS,
Plaintiff-Appellee,

v.

HAMILTON COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,
AND
PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Public Employees Retirement System, a defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit, entered June 3, 1988, affirming the decision of the district court.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

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(614) 644-5003

Counsel for Defendant-Appellant
Public Employees Retirement
System of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by regular U.S. mail, postage prepaid, this _____ day of August, 1988, to Robert F. Laufman, Laufman, Rauh & Gerhardstein, 1409 Enquirer Building, 617 Vine Street, Cincinnati, Ohio 45202, and Thomas E. Deye, Assistant Prosecuting Attorney, 420 Hamilton County Courthouse, Cincinnati, Ohio 45202.

ANDREW I. SUTTER
Assistant Attorney General

TEXT OF STATUTES INVOLVED

29 U.S.C. Section 623(a)(1) and (f)(2)

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age[.]

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization - . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

Ohio Revised Code Section 145.35

Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program. Application must be

made within two years from the date the member's contributing service terminated, unless the disability has existed in some degree as evidenced by medical records, before the member's contributing service was terminated. Application may not be made by or for any person receiving age and service retirement benefits under section 145.33, 145.34, or 145.37 of the Revised Code or any person who, pursuant to section 145.40 of the Revised Code, has been paid the accumulated contributions standing to the credit of his individual account in the employees' savings fund. The application shall be made on a form provided by the public employees retirement board. Any member who is approved for disability retirement shall be placed on retirement as of the first day of the month immediately following the later of:

(A) The last day for which compensation was paid; or

(B) The attainment of eligibility for benefits provided under this section.

Medical examination of a member who has applied shall be conducted by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent. The disability must have occurred since last becoming a member or have increased since last becoming a member to such extent as to make the disability permanent or presumed to be permanent.

If the physician or physicians determine that the member qualifies for retirement by reason of disability, and the board concurs with such determination, the member shall be retired for disability and the action of the board shall be final.

In the event an employer files a disability retirement application to retire a member on disability retirement as a result of his having been separated from service because he is considered to be mentally or physically incapacitated

for the performance of his present duty, and the physician or physicians selected by the board reports to the board that the member is physically and mentally capable of performing service similar to that from which he was separated and the board concurs in the report, the board shall so certify to the employer and the employer shall restore the member to his previous position and salary or to a similar position and salary.

TEXT OF REGULATIONS INVOLVED

29 C.F.R. 860.120(a)(1) and (f)(1)(iii)

(a)(1) The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, [29 U.S.C. § 623(f)(2)] does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in [29 U.S.C. § 623(f)(2)], benefit levels for older workers may be reduced to the extent necesary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

(f)(1)(iii) [W]here employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to

employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.